Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules Governing Retransmission Consent	)	MB Docket No. 10-71
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JOINT COMMENTS OF SMALL- AND MID-SIZED MARKET BROADCASTERS

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<u>JOINT COMMENTS OF SMALL- AND MID-SIZED MARKET BROADCASTERS</u>

Joint Commenters,[1] by counsel, submit these comments in response to the Notice of Proposed Rule Making ("NPRM") regarding the Commission's rules governing the retransmission consent process.[2] Joint Commenters comprise a constituency not expressly acknowledged in the NPRM – the small and medium-sized market broadcaster. Based on their collective experience successfully negotiating retransmission consent agreements with multichannel video programming distributors ("MVPDs") for years, Joint Commenters submit that the current market-oriented retransmission consent regime works as Congress intended when it enacted the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act").[3] As history shows, these rules have enabled broadcasters and MVPDs to complete thousands of deals, with virtually no disruption in service to MVPDs' subscribers. The Commission's existing "good faith" rules are clear, effective, fair to all parties, and properly incent both sides to strike deals, and should be preserved unchanged. Of gravest concern to Joint Commenters is the proposal to eliminate the Commission's long-standing network non-

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1 The Joint Commenters include Gilmore Broadcasting Corporation ("Gilmore Broadcasting"); Landmark Television, LLC ("Landmark"); and Rockfleet Broadcasting, Inc. ("Rockfleet").

2 *Amendment of the Commission's Rules Governing Retransmission Consent*, Notice of Proposed Rule Making, MB Docket No. 10-71, FCC 11-31 (rel. March 3, 2011).

3 1992 Cable Act, Pub L. No. 102-385, 106 Stat. 1460 (1992).

duplication and syndicated exclusivity rules, which both the Congress and the FCC have repeatedly affirmed are "integral" to promoting the key legislative goal of localism, the loss of which would be especially detrimental to small- to mid-sized market broadcasters and their viewers.

I. INTRODUCTION AND SUMMARY

In 1992, Congress established the right of retransmission consent to correct a serious "distortion in the video marketplace which threatens the future of over-the-air broadcasting."[4] This marketplace imbalance was caused by broadcasters effectively subsidizing their strongest competitors – cable systems. Congress chose to remedy that threat to localism by giving commercial broadcasters control over the retransmission of their signals and the sale of those signals by cable operators and other MVPDs for their own profit. At its core, the purpose of the retransmission consent regime was then, and remains today, the "continued economic viability of free local broadcast television,"[5] especially for those "viewers who are unable to afford other means of receiving programming."[6] Thus, any proposed changes to the retransmission consent regime must take into account the ultimate interests of over-the-air viewers as well as viewers who choose to pay a MVPD to deliver freely available broadcast signals.

The system created by Congress and implemented to date by the Commission – which relies on private negotiations between broadcasters and carriers – has served the public well. As Chairman Genachowski recently observed, "[e]ach year, thousands of agreements between broadcasters and pay-TV providers are reached without interruption of customer viewing."[7] But

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4 S. Rep. No. 102-92, at 35 (1991).

5 FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer and Reauthorization Act of 2004* ¶ 8 (Sept. 8, 2005) ("*2005 Report*").

6 1992 Cable Act, § 2(a)(12).

7 Julius Genachowski, Chairman, FCC, Statement on Fox/Cablevision Retransmission Consent Dispute (Oct. 16, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302232A1.pdf

despite evidence that virtually every retransmission consent deal gets negotiated and executed without any fanfare, threat, or loss of service to any subscriber, some MVPDs assert that changes in the marketplace have unfairly tilted retransmission consent negotiations toward broadcasters.

The NPRM points to two factors: first, the "form of compensation *sought* by broadcasters" has allegedly changed; and second, competition among video programming providers has increased. However, the form of compensation "sought" by Joint Commenters, and likely most broadcasters, has *always* included cash, just as Congress expected when it implemented retransmission consent almost two decades ago. This is especially true for smaller broadcasters who, until recently, generally did not own or broadcast any other program services for which they could seek carriage as a form of "in kind" consideration. The much-needed introduction of competition to the MVPD marketplace has merely enabled broadcasters, for the first time, to negotiate successfully for the right to *receive* cash consideration from MVPDs. The fact that Joint Commenters, with small- to mid-sized market stations, have recently been able to secure modest sums of cash consideration from large, national MPVDs is evidence of an emerging market success, not a market failure requiring intervention from the federal government.[8]

As shown below, Joint Commenters face unique challenges in their efforts to produce, acquire, and fund desirable programming that is provided free, over-the-air, to viewers in some of the nation's smaller markets. Thus, Joint Commenters urge the Commission to retain its historical marketplace-oriented approach to retransmission consent. Most fundamentally, Joint Commenters support the Commission's tentative conclusion that it lacks statutory authority to

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[8] The NPRM posits that a "result" of marketplace change has been a rise in the "contentious[ness]" of retransmission consent disputes. Joint Commenters submit that the more likely cause for any perceived increase in negotiating impasses is the hard bargaining that is occurring to get MVPDs to pay for highly valuable programming that, until recently, MVPDs were able to extract from many broadcasters without paying a penny in cash.

compel interim carriage or to mandate binding dispute resolution mechanisms in those extremely rare instances in which a bargaining impasse has occurred. Moreover, given the successful track record of the existing "good faith" rules, and the fact that no two deals are exactly alike, the Commission should refrain from imposing new one-size-fits-all proscriptions on the negotiation of contracts that could, unintentionally, restrict the parties' ability to craft creative and flexible arrangements in the future. Finally, the Commission should not eliminate its program exclusivity rules. These rules are of particular importance to Joint Commenters, who must often compete against stations in adjoining media markets and the very MVPDs that seek retransmission consent, for viewers and advertisers. The existing rules give broadcasters an effective mechanism to enforce privately negotiated rights to exclusivity for highly popular programming, and as a result, promote the availability of free, local, over-the-air television service.

In short, the nation's MVPDs do not need the help of the federal government to negotiate fair agreements to retransmit, for their own profit, the valuable signals of local broadcast stations. The interests of over-the-air viewers, as well as subscribers to MVPDs, will be best served by maintaining the Commission's existing rules, which wisely rely on the parties themselves to negotiate the substantive terms of carriage agreements.

II. STATIONS IN SMALL- AND MEDIUM-SIZED MEDIA MARKETS CONFRONT UNIQUE CHALLENGES TO NEGOTIATE FAIR AND REASONABLE TERMS FOR RETRANSMISSION CONSENT.

Joint Commenters are representative of the nation's small- and mid-sized television broadcasters. In aggregate, Joint Commenters own 5 full-power television stations, each of which is an affiliate of a "Top Four" national broadcast network. Gilmore Broadcasting operates a single full-power television station, and both Rockfleet and Landmark operate two full-power television stations. As a group, Joint Commenters are geographically diverse. Together, Joint Commenters serve the nation's 29th largest television market – Nashville, Tennessee – as well as its 154th – Bangor, Maine.

Collectively and individually, Joint Commenters have a remarkable record of valuable service to the communities in which their stations are located. Each of Joint Commenters' stations produce local news programming, and Joint Commenters' full-power stations are typically ranked first or second in their markets for local news programming.

Joint Commenters have received a plethora of the premiere awards for excellence in journalism, including three duPont Awards, two Peabody Awards, and a National Edward R. Murrow Award. For example:

- WTVF(TV), which serves Nashville, Tennessee, won both a duPont and a Peabody Award for its "Friends in High Places" series that investigated allegations of fraud in awards of state contracts. According to the award citation, the station's three-year series that ran from [2002-2004] led to a federal fraud conviction of an appointee of the Tennessee governor. WTVF(TV)'s series was also credited by the U.S. Department of Justice as "the impetus for a federal task force being created to investigate the awarding of state contracts and was acknowledged by a federal grand jury as playing a key role in the indictment returned against" a state employee.[9]

- KLAS-TV, which serves Las Vegas, Nevada, won a 2008 Peabody Award for its documentary, "Crossfire: Water, Power and Politics," which explored the impact of a plan to divert water from rural Nevada to Las Vegas. According to the Peabody Board, KLAS-TV received the award, in part, because "[l]ocally produced television documentaries are an endangered species, so it's all the more impressive that Las Vegas station KLAS-TV put so much effort and care into a report that had the potential to alienate rich and powerful constituents – and presented it in prime time."[10]

The citations for these awards demonstrate the value of Joint Commenters' stations as well as the continued need for locally produced, free, over-the-air television broadcasting.

Given the value of their and top-tier news services, network affiliations and popular syndicated programs, following the passage of the 1992 Cable Act, Joint Commenters have generally elected retransmission consent instead of must-carry. Joint Commenters recognize that

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[9] The Peabody Awards, NewsChannel5 Investigates: Friends in High Places, http://www.peabody.uga.edu/winners/details.php?id=1388 (last visited May 25, 2011).

[10] The Peabody Awards, Crossfire, http://www.peabody.uga.edu/winners/details.php?id=2579 (last visited May 25, 2011).

their programming adds tremendous value to an MVPD's channel line-up. Yet, despite this value, Joint Commenters have only recently been able to negotiate cash compensation for cable carriage.[11] Among the Joint Commenters, Gilmore was the first to successfully negotiate a cash fee for grant of retransmission consent to a cable operator, obtaining cash retransmission consent fees for WEHT(TV) in 2008. Landmark's KLAS-TV and WTVF(TV) first received cash retransmission consent fees from cable operators in 2009. Rockfleet received its first cash retransmission consent fees from cable operators in 2011 for WJFW(TV) and WFVX-LP, which serve the Wausau/Rhinelander DMA, although the company has not yet been able to secure cash retransmission consent fees from any cable operators for WVII(TV), which serves the Bangor, Maine DMA.

During each retransmission consent election cycle, Joint Commenters' stations typically engage in multiple retransmission consent negotiations. On average, each of Joint Commenters' stations must negotiate retransmission consent with one or two dominant MVPDs and several secondary MVPDs. For example, Landmark's KLAS-TV, which serves the Las Vegas, Nevada DMA, reaches 92% of its audience by negotiating carriage with only three MVPDs: Cox (63%), DIRECTV (19%) and DISH Network (10%).

Despite the transactional costs associated with negotiating numerous carriage agreements, the steady, predictable revenue streams that retransmission consent fees generate have become critical to Joint Commenters' ability to deliver high quality content to viewers and to survive in the increasingly competitive programming marketplace. The television advertising market is volatile, and advertising revenues vary with the health of the economy. Moreover, cash fees provide modest but critical resources to broadcasters as they decide how to devote scarce capital

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11 Generally, broadcasters have been able to negotiate cash retransmission consent fees with DBS providers following commencement of local-into-local service.

to local programming. On average, Joint Commenters only derive between *three to five percent* of their gross annual revenues from retransmission consent fees.

On the whole, Joint Commenters believe that the existing regulatory framework facilitates efficient, market-driven retransmission consent negotiations that produce tangible benefits to broadcasters, MVPDs, and, most importantly, the public. Since 1992, Joint Commenters have negotiated scores of agreements to enable MVPDs to sell Joint Commenters' signals to subscribers for profit. And, throughout all of those negotiations, Joint Commenters' audiences have faced only a single brief service disruption.[12] On the whole, then, Joint Commenters' collective experience describes an enviably efficient marketplace for negotiating the carriage of broadcast signals.

III. EXISTING MARKET-ORIENTED RULES BEST SERVE THE INTERESTS OF OVER-THE-AIR VIEWERS AND MVPD SUBSCRIBERS.

The Commission's existing market-based approach to retransmission consent benefits consumers and all market participants. For nearly two decades, MVPDs have consistently secured access to some of the most popular programming and resold it for their own profit to their subscribers.[13] More recently, broadcasters have begun to realize at least some economic benefit, as anticipated by Congress years ago, for the value they provide to one of their *chief competitors*, which in turn helps fund the broadcasters' purchase and creation of unique local services and popular programming. MVPD subscribers benefit from access to programming through multiple delivery systems. And over-the-air viewers who cannot, or choose not, to pay for subscription MVPD service benefit from continued access to freely available, highly popular, and expensive to produce, programming. By any measure, the existing regime is a resounding

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[12] For a period of time in the summer of 2000, Landmark's WTVF(TV) was not carried by Dish Network at the end of protracted retransmission consent negotiations.

[13] Of course, prior to 1992, MVPDs were able to appropriate broadcasters' signals without any express consent.

success, and should be maintained without modification.

A. **<u>The FCC Correctly Concluded that It Lacks Authority to Compel Carriage or to Mandate Dispute Resolution Procedures Without the Broadcaster's Consent.</u>**

The Commission has consistently recognized that it possesses limited authority to regulate good faith retransmission consent negotiations.[14] Thus, the Commission is correct that Congress has not authorized it to impose either interim carriage or binding dispute resolution processes to resolve retransmission consent impasses.[15] The plain language of the 1992 Cable Act underscores that broadcaster consent to cable carriage is the bedrock principle in the statutory must-carry/retransmission consent regime: "[n]o cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except – (A) with the *express authority* of the originating station."[16] Because the right to grant consent to carriage is meaningless without the corresponding right to withhold consent to carriage, any attempt by the Commission to mandate carriage of a station's signal over the broadcaster's objection would exceed the FCC's authority under the 1992 Cable Act. Moreover, as the Commission noted in the NPRM, the legislative history of the 1992 Cable Act provides further evidence of Congress' intent that market forces, not the government, should drive negotiations for the carriage of broadcast signals.[17] Accordingly, Congress left the Commission no discretion to permit an MVPD to retransmit a broadcaster's signal without consent.

Likewise, Congress has not given the Commission authority to require broadcasters and MVPDs to submit to binding dispute resolution procedures to resolve retransmission consent

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14 *Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report & Order, 15 FCC Rcd 5445, 5453 (2000) (noting that 47 U.S.C. § 325(b)(3)(C) "should be narrowly construed") (the "*Good Faith Order*").

15 NPRM ¶ 18.

16 47 U.S.C. § 325(b)(1)(A).

17 *See* text accompanying n. 28, *infra*.

disputes. In drafting the 1992 Cable Act, Congress intended to create a marketplace for broadcast signals, not to "dictate the outcome of ensuing marketplace negotiations."[18] As a result, the Commission is not empowered to compel any party to a retransmission consent negotiation to submit to binding arbitration or any other dispute resolution mechanism. Joint Commenters also agree with the Commission's belief that requiring parties to submit to binding dispute resolution is inconsistent with the Administrative Dispute Resolution Act,[19] which requires parties' consent to binding arbitration and bars agencies from "requir[ing] any person to consent to arbitration as a condition of … obtaining a benefit."[20]

Nor are forced "interim" carriage or binding arbitration sensible from a public policy perspective. Inherent in the power to grant retransmission consent is the power to withhold consent. If MVPDs can invoke federal power to *compel* carriage, they will have very little incentive to *negotiate* for carriage. Moreover, if MVPDs can subject broadcasters to involuntary, costly and time-consuming binding dispute resolution processes, broadcasters would be stripped of much of their ability to bargain. This would be especially true for Joint Commenters, who would suffer from a radically disadvantaged negotiating position if a major MVPD with national reach threatens to invoke arbitration for carriage rights for a single, small-market station with a fraction of the MVPD's economic clout.

B. Market Forces Incent Broadcasters and MVPDs to Reach Mutually Acceptable Arrangements that Benefit Over-the-Air Viewers and MVPD Subscribers.

The existing market-driven retransmission consent framework provides strong incentives to both broadcasters and MVPDs to negotiate carriage agreements that allow MVPDs to sell

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18 S. Rep. No. 102-92, at 36.

19 NPRM ¶ 18.

20 5 U.S.C. § 575(a)(1), (3).

broadcasters' highly-valuable signals to subscribers for profit. Indeed, the Commission has concluded that, "as a general rule, the local television broadcaster and the MVPD negotiate in the context of a level playing field" in which each side benefits from successful negotiation and suffers from failure to strike a deal.[21] None of the marketplace changes alleged by proponents of additional government intervention in retransmission consent negotiations fundamentally alters this calculus. In fact, to the extent the marketplace tilts in one direction or the other, Joint Commenters submit that it typically favors the MVPD.

Take the case of a Joint Commenter negotiating against a national MVPD with millions of subscribers, for carriage of a single station reaching nearly 150,000 television households, but 50% of which are served by a national MVPD. In this case, failure to grant retransmission consent could cause the broadcast station immediately to lose a majority of its MVPD viewers. Since the business model for broadcasting continues to be almost entirely advertiser-based, the station could suffer an immediate loss of revenue. In contrast, if the MVPD lost the right to retransmit the signal of a single broadcast station, it would continue to benefit economically from the sale of hundreds of other video services (and, increasingly, bundled with broadband and telephony services) to its subscribers. It would not suffer any economic loss unless, and until, a subscriber left for a competing MVPD.[22] Moreover, the MVPD's operations everywhere else in the country would be completely unaffected. In contrast to the broadcaster, whose loss from a retransmission consent impasse could be immediate and certain, the harm to the MVPD would be speculative and buffered by revenues received from millions of subscribers in other markets.[23]

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21 *2005 Report* ¶ 44.

22 The experience of a small MVPD would be the same as the national MVPD in this regard – it would still deliver multichannel service to subscribers and would not encounter any loss until a subscriber terminated service.

23 In this example, the small-market broadcaster will almost certainly be unable to secure from the MVPD the level of compensation that a major-market station would likely attract. Joint Commenters would certainly like to earn the same fees as a network affiliate in the New York DMA may get, but they strongly believe the marketplace,

In this scenario, the MVPD with a nationwide subscriber base of millions obviously would need no help from the federal government to negotiate carriage terms for the station that reached a fraction of one-percent of those viewers. Yet, that is the illogical outcome sought by proponents of changes to the Commission's good faith rules.

Nothing in the market has so substantially shifted the balance of power toward the broadcaster to warrant federal intervention since 1992, when Congress, in the name of preserving local broadcast service, granted television broadcasters some limited protection from cable that increasingly competed for the same advertising dollars. If anything, the number of venues available to advertisers has expanded significantly over the past two decades, forcing broadcasters to survive with more competition than ever. Yet, the rationale for the 1992 Cable Act still holds, and broadcasters remain subject to the same market forces that strongly incent them to avoid service disruptions.

Accordingly, Joint Commenters submit that the existing marketplace imposes sufficient discipline on all participants – and most especially on small-market broadcasters – to strike a deal for retransmission consent for the benefit of broadcasters' and MVPDs' common constituents – the viewers.

C. Expanding the Scope of Per Se Violations of the Commission's Good Faith Standards Would Undermine the Flexible, Free Market-Based Retransmission Consent Process Promoted by Existing Rules.

The purpose of the Commission's *per se* rules historically has been to police those instances in which parties have not "enter[ed] into negotiations with the sincere intent of trying

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not the government, should dictate the result. Thus, while the NPRM asks (at ¶ 29) whether smaller MVPDs *pay* more in retransmission consent fees than larger providers (but not whether small-market broadcasters *earn* less than their large market cousins), the Commission should refrain from interfering in any negotiation with the outcome of the most fundamental marketplace function – price.

to reach an agreement acceptable to both parties."[24] Thus, the Commission has previously considered – and properly rejected – calls to create an extensive list of activities that, in all instances and for all purposes, would be considered *per se* violations of the good faith standard. Since no two deals are alike, this sensible approach has provided parties with flexibility to craft arrangements that address the unique needs of particular transactions. Given the success of the current regime, Joint Commenters believe that additions to the *per se* list are unnecessary. A few of the Commission's proposals are of particular concern to the Joint Commenters and are addressed here.

First, while perhaps facially appealing, the proposals to list as *per se* violations the failure to "put forth *bona fide* proposals on important issues" and to "unreasonably delay" negotiations are fraught with ambiguity and would needlessly create, not mitigate, confusion over the standard of good faith.[25] The parties to retransmission consent negotiations are sophisticated, repeat players. As such, both MVPDs and broadcasters are keenly aware of the important issues and the timeline in which carriage disputes must be resolved. Further, the Commission has previously noted that, out of necessity, its list of *per se* violations "must be concise, clear, and constitute a violation of the good faith standard in all possible instances."[26] The Commission's proposed "*bona fide* important issues" and "unreasonable delay" standards would not meet these important criteria. What is "important" to a broadcaster may not be material to an MVPD in a particular instance. Likewise, there are perhaps only a handful of terms – such as "reasonable"[27] – that may have been more litigated than the phrase "*bona fide.*" Such broadly structured *per se*

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[24] *Good Faith Order*, 15 FCC Rcd at 5462.

[25] NPRM ¶ 24.

[26] *Good Faith Order*, 15 FCC Rcd at 5457.

[27] *Preserving the Open Internet*, Rep. & Order. 25 FCC Rcd 17905, 18050 (McDowell dissenting) ("'Reasonable' is a subjective term. Not only is it perhaps the most litigated word in American history, its definition varies radically from country to country.")

violations would significantly erode Congress' expressed intent not to interfere with marketplace negotiations between private parties.[28]

Second, no party to a negotiation should be compelled to submit to non-binding mediation in the 30 days before the expiration of an existing retransmission consent agreement. The Commission has previously rejected calls to mandate non-binding arbitration, and should do so again here.[29] Mediation could encourage parties to spend more time developing the equivalent of litigation strategies for presentation to a third party, rather than engaging in the hard bargaining that is needed to strike a deal. Non-binding mediation would also impose unnecessary costs, which would be especially harmful to small-market broadcasters with limited resources. For this reason, the threat of being compelled by a national MVPD to appear in mediation could have the same detrimental effect of reducing a small broadcaster's already limited ability to bargain.

D. Broadcasters Should Have the Discretion, but not the Regulatory Obligation, To Provide On-Air Notice to Subscribers About the Status of Retransmission Consent Negotiations.

Joint Comments believe broadcasters are in the best position to know whether, and how, notice of particular retransmission consent negotiations should be provided to viewers. As discussed above, the marketplace gives all broadcasters – and especially small-market stations – strong incentives to reach agreement for retransmission consent. And while agreements sometimes come down to the wire, history shows that actual service disruptions are extremely rare. As a result, mandating broadcast notices of ongoing retransmission consent negotiations would be unnecessary in almost all instances.

Broadcasters want to avoid annoying or disenchanting their viewers, so they have and

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28 S. Rep. No. 102-92, at 36.

29 *Good Faith Order*, 15 FCC Rcd at 5471.

will provide their audiences with appropriate notice if their service may not be available on a particular MVPD. Unlike the MVPD whose notices would be received only by its subscribers, broadcast station's notices would be viewed by every MPVD subscriber in the market, as well as by over-the-air viewers. As a result, compelling a station to broadcast an announcement about a potential service disruption for subscribers of single operator could create unnecessary confusion for subscribers of all other MVPDs that carry that station.[30] Since many people receiving notice from the broadcaster would be wholly unaffected by the retransmission consent issue, the station needs to exercise caution in deciding how to provide notice in a particular case, given its knowledge of the ongoing negotiation. At bottom, the public would be best served by not imposing a notice obligation on broadcasters, but by enabling them to continue to exercise discretion to provide notice in appropriate situations.

E. <u>Network Non-Duplication and Syndicated Exclusivity Rules Are Critical to the Ability of Small- and Mid-Sized Market Stations To Attract Viewers and To Fulfill Their Statutory Obligation To Provide Local Service.</u>

The proposal to eliminate or substantially restrict the network non-duplication and syndicated exclusivity rules runs counter to decades of Congressional policy and Commission holdings that have consistently found the program exclusivity rules to provide substantial public benefits and to promote the key principle of localism. Joint Commenters submit that a proceeding focused on a narrow aspect of retransmission consent negotiations is the wrong place to consider such a profound change in policy.

Broadcasters have negotiated for some measure of exclusivity from their programming suppliers since the earliest days of radio.[31] Critically, both the Congress and the Commission

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30 Joint Commenters experienced similar confusion from viewers who received multiple notices regarding the transition to digital television, but were personally unaffected by changes occurring to over-the-air services because they received broadcast signals via alternative means.

31 For example, CBS first guaranteed program exclusivity to its radio affiliates in 1937. FCC, *Report on*

have repeatedly held that such exclusivity is a critical component of the ability to maintain free, over-the-air, *local* service. Thus, for almost half a century, the Congress and the Commission have provided broadcasters with an effective means to enforce rights to exclusive programming that were bargained for in the private marketplace. While the rules have changed over the years, the "policy behind them has remained the same," namely, "to provide appropriate protections and incentives to program producers and distributors to provide the programming desired by viewers."[32] Elimination of these long-settled rules – either in all instances or in the case retransmission consent has not been granted – would radically alter the programming marketplace, inhibit the ability of stations, especially those in smaller markets, to attract audiences, and ultimately frustrate their capacity to provide local service as mandated by the Communications Act. Joint Commenters urge the Commission to see MVPDs' efforts to deprive broadcasters of their contractual rights to program exclusivity for what they are: self-serving attempts by competitors to maximize their own profits by depriving broadcast stations of their ability to obtain the benefit of the exclusive rights they have acquired for highly popular (and expensive) network and syndicated programming.

Congress and the Commission have long recognized that MVPDs' incentives to deliver programming at the lowest cost, for example by importing distant signals, do not align with the statutory mandate of broadcasters to provide free, *local*, over-the-air television broadcasting service.[33] At the same time, the Commission has recognized that, absent rules, broadcasters lack

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Chain Broadcasting 35 (1941).

[32] *2005 Report* ¶ 19. Congress has also repeatedly extended program exclusivity rights to new technologies. For example, Congress mandated that the Commission extend its program exclusivity rules to DBS and OVS. Telecommunications Act of 1996, Pub L. 104-104, § 653(b)(1)(D) (1996) (OVS); Consolidated Appropriations Act for 2000, Pub. L. 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999, whose § 1008(a) extended network non-duplication and syndicated exclusivity to DBS).

[33] *See Program Exclusivity in the Cable and Broadcast Industries*, Report & Order, 3 FCC Rcd 5299, 5300-01

an effective means to enforce their valid rights to program exclusivity.[34] Thus, the Commission's program exclusivity rules provide broadcasters an efficient and cost-effective *means* to exercise privately negotiated rights.[35] Critically, the rules do not *create* the rights protected. Exclusivity must be bargained for and agreed to by the broadcaster and its program supplier.

The existing rules are critical to the ability of a broadcast station, especially in a small market adjoining a larger DMA with powerful stations, to attract audiences and advertising revenue. Deprived of effective exclusivity rules, a broadcaster would not have an effective means to prevent a MVPD from importing a duplicating distant signal from the neighboring market, causing the local station to likely lose viewership to the imported signal.[36] Since the vast majority of broadcast revenues are generated by advertising, the loss could be substantial, especially since the most popular and highly-rated programming is the most likely programming to be duplicated.[37] As a result, the local station would lose revenues from popular (and profitable) programming that are critically needed to pay for the local services that broadcasters are obligated by law to deliver to their communities.

In contrast, the station whose duplicating signal is being imported would not likely

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(1988) (noting that protecting television broadcasters' rights to program exclusivity is necessary to ensure that the growing cable industry would not "endanger . . . the economic viability of local broadcast stations") ("*1988 Syndicated Exclusivity Order*").

[34] *See id*. at 5309.

[35] *See*, *e.g.*, *id* at 5300-01 (quoting *Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave to Relay Television Signals to Community Antenna Systems*, First Rep. & Order, 38 FCC 683, 715 (1965)) (noting that program exclusivity rules "preserve local stations the credit to which they are entitled – in the eyes of the advertisers and the public"); *id* at 5311 (noting that "[l]ack of exclusivity protection distorts the local television market to the detriment of the viewing public, especially those who do not subscribe to cable").

[36] *Id.* at 5319 (noting that following the temporary withdrawal of network non-duplication protection, a station in Palm Springs, California lost roughly one-half of its audience when MVPDs began to carry the signal of a large-market affiliate of the same network).

[37] *See*, *e.g.*, *id.*; *CATV Non-Duplication Rules*, First Rep. & Order, 33 RR2d 527, ¶ 2 (1975) (finding, in *Carter Mountain Transmission*, that a "proposed service by providing a cable system with distant signals which duplicated the programming of the only local television station, would have a sufficiently adverse economic impact on that station to cause its demise").

benefit, since advertisers from neither the local market nor the distant station's home market would be interested in paying for it. The net result is that the local station, which had contracted (and paid) for exclusivity, would be effectively deprived of its bargained-for rights, resulting in substantial lost revenues, all while forfeiting viewership to an out-of-market signal. In addition, deprived of any effective means to enforce exclusivity, the value of the programming would likely decline for the small market broadcaster, who would then be incented to pay less for it. In turn, if the program supplier concluded it could receive a higher return by selling the programming to a distributor that would pay more for true exclusivity – for example, a cable network with effective exclusivity rights – more popular programming could migrate from free, over-the-air broadcast to paid subscription services, further eroding the opportunity for over-the-air viewers to access highly popular programming.

Such a perverse result would run counter to the bedrock legislative goal of localism. Indeed, the Commission has repeatedly considered, and rejected, efforts to eliminate its program exclusivity rules and enable MVPDs to import duplicating signals, notwithstanding broadcasters' contractually-negotiated rights.[38] As the Commission recently observed, "we do not deem it in the public interest to interfere with contractual arrangements that broadcasters have entered into for the very purpose of securing programming content that meets the needs and interests of their communities. Such interference would contradict our own requirements of broadcast licensees and would hinder our policy goals."[39] Indeed, according to the FCC, "the legislative history of the 1992 Cable Act indicates that the network non-duplication and syndicated exclusivity rules were viewed as *integral* to achieving congressional objectives," which, of course, includes

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38 *2005 Report* ¶ 50, n. 172.

39 *Id.* ¶ 50.

retransmission consent.[40] Thus, the Commission refused to propose to eliminate its program exclusivity rules because of the grave risk posed by "major disruption and possible unintended consequences of rendering these rules unenforceable with respect to broadcasters that elect retransmission consent…."[41] Nothing has occurred in the market that would justify a radical change in policy.

The Commission's program exclusivity rules remain just as viable and necessary today as they have been for the past several decades. The rules provide an efficient and cost-effective means, well understood by all industry players, to enable broadcasters to enjoy privately acquired rights to exclusive programming. Stations and program suppliers have negotiated programming agreements in material reliance on the rules' existence, so that a radical change in rules would risk massive disruption in the marketplace.

Most critically, given the unique nature of broadcast services, broadcasters would have no *practical* means to enforce their contractual rights in the absence of the rules.[42] In almost all cases, MVPDs acquire the intellectual property rights to distribute programming contained in a broadcast signal not from the broadcaster, but pursuant to statutory licensing.[43] Thus, a broadcaster typically only provides retransmission consent rights under Section 325(b) of the Communications Act for distribution of its *signal* by MVPDs. As a result, unlike a program

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40 *Id.* (emphasis added).

41 *Id.* ¶ 51. The Commission concluded that any changes to the rules "should be undertaken cautiously in view of the important role these rules play in enabling local broadcasters to provide robust *local service*." *Id.* (emphasis added). Joint Commenters respectfully submit that this proceeding is entirely the wrong proceeding to embark on such a fundamental change to how broadcasters protect their right to distribute programming on an exclusive basis within their local markets.

42 Joint Commenters also note that the FCC's program exclusivity rules impose numerous restrictions on the scope of exclusivity that may be contracted for by a broadcast station, and provide multiple exceptions to a MVPD's obligation to enforce a broadcaster's rights. *See*, *e.g.*, 47 C.F.R. §§ 73.658 (limiting the scope of territorial exclusivity); 76.92(f) (exempting significantly viewed stations); 76.95(a) (exempting small cable systems); 76.106(a) (exempting significantly viewed stations); 76.106(b) (exempting small cable systems).

43 *See*, *e.g.*, 17 U.S.C. §§ 111(d) (statutory license for cable systems); 119 (statutory license for satellite carriers); 122 (local-into-local license for satellite carriers).

supplier that can effectively control distribution of its *content* through direct licensing, a broadcaster with exclusive distribution rights in its local market cannot withhold the copyright to that programming and preclude a MVPD from distributing duplicating programming originating from a distant broadcast station. Without the FCC's program exclusivity rules, MVPDs could rely on statutory licensing to import a distant signal without regard to the local station's contractual rights to programming. Such a result would be particularly perverse, since MVPDs compete against broadcasters with their own exclusive programming.

The need to provide audiences with unique and attractive programming was evident when the Commission first adopted program exclusivity rules in an era in which cable was still in its nascent stages, DBS was not yet on the drawing board, and broadband internet access was the stuff of science fiction. The need for effective enforcement of broadcasters' exclusivity rights remains all the more evident in today's rich media landscape, in which television stations must compete with programming offered over cable, DBS, and broadband internet connections.

The Commission recently observed that retransmission consent, program exclusivity, and copyright compulsory licensing "do not operate in a vacuum" and that "when any piece of the legal landscape governing carriage of television broadcast signals is changed, other aspects of that landscape also require careful examination."[44] As shown above, the proposal to eliminate program exclusivity risks substantially adverse consequences for broadcasters, especially in smaller markets, threatening their ability to deliver the free, over-the-air, *local* service required of them by the Communications Act. Thus, Joint Commenters strongly urge the FCC to leave its existing network non-duplication and syndicated exclusivity rules in place.

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[44] *2005 Report* ¶ 33; *see also* S. Rep. No. 102-92, at 38 (noting that in establishing retransmission consent, Congress "relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules" and that "[a]mendments or deletions of these rules in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would, in [Congress'] view, be inconsistent with the regulatory structure" enacted in the 1992 Cable Act).

IV. CONCLUSION

The Commission's market-based approach to retransmission consent, together with its program exclusivity rules, have generated enormous public interest benefits by promoting the carriage of local stations with programming attractive to viewers and promoting the availability of high-quality, over-the-air, local service. Accordingly, the FCC should sustain its current good faith and program exclusivity rules without modification.

Respectfully submitted,

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